No. 799

In the Supreme Court of the United States

OCTOBER TERM, 1960

KENYON B. ZAHNER, PETITIONER

v.

EZRA TAFT BENSON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia (R. 210) is not reported. The opinion of the United States Court of Appeals for the District of Columbia Circuit (Pet. App. 16-18) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on November 17, 1960. A petition for rehearing *en*

banc was denied on December 23, 1960. The petition for a writ of certiorari was filed on March 10, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, on the facts of this case, the court below correctly held that petitioner was guilty of laches in the prosecution of his suit for reinstatement in a position in the Farmers Home Administration.

STATEMENT

Petitioner, a veterans preference eligible with civil service status, held a position as an Administrative Officer, GS-13 (Insured Mortgage Specialist) in the Farm Ownership Division of the Farmers Home Administration (FHA) (R. 5). On December 31, 1953, all FHA employees were sent a memorandum informing them that FHA would be reorganized so as to decrease personnel costs by forty percent (R. 123). Since the position of Insured Mortgage Specialist was being abolished, petitioner was sent a notice of reduction in force which recited that his appointment would be terminated on April 14, 1954 (R. 121).

Petitioner appealed his reduction in force to the Civil Service Commission (R. 126). He claimed that he was fully qualified for, and, as a veteran with the highest retention preference, was entitled to, certain positions which were held by persons with a lower retention preference.

On April 5, 1954, petitioner received a hearing before a hearing examiner of the Commission (R.

133). The hearing examiner, approving the action of the FHA, observed (R. 134):

> The only position * * * for which Mr. Zahner might be considered was that of the Emergency Credit Officer, grade GS-13. In the course of the hearing, Mr. Zahner admitted that he did not know the Emergency Loan Act and its background or the several amendments to that Act. Since these loans were made for entirely different reasons and under different conditions from those in which Mr. Zahner was experienced, it is the opinion of the Hearing Examiner that Mr. Zahner is not qualified to assume the duties and responsibilities of this position, without, as the agency has stated, clearly impeding the work of the organization and necessitating assistance in carrying out the responsibilities of the office.

Petitioner was informed of the decision of the Commission by a letter from the chief of the Commission's Appeals Examining Office (R. 131). The letter stated that (R. 131-132):

> It was found that you were not qualified under the examining standards * * * for the positions of Production and Subsistence Officer, GS-13, or Farm Ownership Loan Officer, GS-13. It is the opinion of this office that while you were found qualified under the examining standards for the position of Emergency Credit Officer, GS-13, that on the basis of your experience and training, you were not qualified to assume the duties and responsibilities of this position without further instruction and, consequently, interruption to the work program of the organization.

This decision was affirmed by the Commission's Board of Appeals and Review on May 24, 1954 (R. 159). The Board's decision was explained as follows (R. 159-160):

> When your position was abolished in the reduction in force, you were considered for placement in other positions in order to be retained. As a war veteran with retention standing in retention subgroup I-A, you had the right to displace any employee with lower subgroup standing from a continuing position for which you had sufficient qualifications to render satisfactory service without undue interruption. You were found to lack minimum qualifications for positions as Production and Subsistence Officer, GS-13 and Farm Ownership Loan Officer, GS-13. You met minimum standards for eligibility as Emergency Credit Officer, GS-13, but lacked the specialized skills necessary to displace the incumbent and continue the work without undue interruption. This is the principal point stressed in your appeal of the initial decision.
>
> The Board has reviewed your extensive experience in placing and servicing loans for the Union Central Life Insurance Company. However, this was a investment program in which emphasis was always placed on safeguarding the money loaned. The benefits to borrowers were always subordinated to the safety of the investment. In the Farmers Home Administration, the emphasis is entirely on aid to borrowers, and the safety of the money loaned is secondary. While you are fully familiar with the basic principles governing loans as investments, you lack specialized knowledge of the use of loans as one method

which must be coordinated with other methods for the rehabilitation of borrowers. This is the basis for the decision of your agency which was affirmed by the Commission's Appeals Examining Office. The Board's analysis supports this finding.

Petitioner appealed this decision to the Commissioners of the Civil Service Commission, who, on August 4, 1954, affirmed the decision of the Board of Appeals and Review. In the letter informing petitioner of the decision, the Commission noted that its decision was final and that petitioner had exhausted his administrative remedies (R. 155-156).

On August 8, 1955, more than one year after he had exhausted his administrative remedies, petitioner filed suit in the District Court for the District of Columbia (Civil Action No. 3501-55), alleging, *inter alia*, that his removal from the government service was arbitrary and capricious, and seeking reinstatement to the Department of Agriculture (R. 9). This action was dismissed on May 16, 1958, because petitioner had failed to substitute newly appointed members of the Commission as parties defendant within the requisite six-month period (R. 9). Rule 25(d), F. R. Civ. P.

The present action (Civil Action No. 1396-58) was filed on May 29, 1958, stating the same claim as in the earlier suit (R. 3-11). Respondents filed an answer which denied petitioner's allegation that he had been improperly removed, and which raised the defense of laches (R. 12-14).

In April 1959, a trial was held at which extensive testimony was heard and numerous documentary exhibits were introduced concerning the propriety of petitioner's separation (R. 16-91). As regards the issue of laches, petitioner testified that the delay in initiating his original suit in the district court was occasioned by his concern over a serious illness and a death in his immedate family, both of which occurred in the period between August 1954, when he exhausted his administrative remedies, and August 1955, when he commenced his original suit (R. 34-35). In addition, he testified that he had been unemployed for eighteen months following his separation from the FHA, and that he is now employed by the Veterans Administration as their chief appraiser for the State of Georgia in the loan guarantee program (R. 36).

On October 26, 1959, Judge Curran issued a memorandum opinion (R. 210-211) in which he held to be "arbitrary and capricious and of no legal efficacy" (R. 211) the decision of the Board of Appeals and Review (R. 159-160) that petitioner's non-governmental experience with the Union Central Life Insurance Company did not prepare him with the "specialized skills necessary to * * * continue the work [of an Emergency Loan Officer] without undue interruption" to the work program because that experience had trained him to place the emphasis "on safeguarding the money loaned" rather than on aiding the borrower, which was the main concern of the FHA. Subsequently, on November 10, 1959, the court filed find-

ings of fact (R. 212-214) and conclusions of law (R. 214) and entered judgment (R. 215) in favor of petitioner. Concluding that petitioner was not guilty of laches (R. 214), the court ordered that he be "reinstated * * * retroactively to the date of April 14, 1954, to a position as Emergency Loan Officer in the Farmers Home Administration * * * Grade GS-13, or to a Grade GS-13 position comparable to it in the Department of Agriculture * * *" (R. 215).

On appeal to the Court of Appeals for the District of Columbia Circuit, the government renewed the question of petitioner's laches and also questioned the decision of the district court on the merits.

On November 17, 1960, the court of appeals reversed the decision of the district court, holding that petitioner was guilty of laches (Pet. App. 16-18). The court concluded that the cumulative effect of the initial one-year delay in instituting suit after the exhaustion of petitioner's administrative remedies and the additional delay attributable to his lack of diligence in substituting indispensable parties was prejudicial to the government.

A petition for rehearing *en banc* was filed by petitioner on December 2, 1960 (R. 221-230), and was denied on December 23, 1960 (R. 231).

ARGUMENT

The decision of the court of appeals establishes no new principle of law in the field of the government's relationship with its employees; on the contrary, the court has merely determined, on the facts of this

particular case, that the doctrine of laches applies, and precludes the relief which petitioner seeks. Since the decision turns upon the facts involved, further review by this Court is not warranted.

1. On August 4, 1954, petitioner exhausted his administrative remedies (R. 155). His original complaint was not filed until August 8, 1955—more than one year later (R. 9). In an attempt to explain this initial delay, petitioner testified that it had been occasioned by his concern over a serious illness and a death in his immediate family (R. 34-35). Yet the record reveals that in early 1955, when petitioner indicated that his undivided attention was being given to these personal matters, petitioner consulted an attorney regarding his separation from the FHA ("around January, 1955" (R. 61)) and dispatched a letter to the Chairman of the Commission, dated February 2, 1955, requesting reconsideration of his case (R. 157). But regardless of whether petitioner has explained the initial delay in commencing his suit for reinstatement, he cannot explain away his failure timely to substitute newly appointed members of the Commission as parties defendant, which resulted in the abatement and dismissal of the original action. The cumulative time lapse, attributable to the delay in commencing his action and to the delay incident to the failure diligently to prosecute the suit after it was commenced, amounts to three years and nine months. In such circumstances, the court of appeals rightly concluded that the case was an appropriate one for the application of the doctrine of laches. As

this Court held in *United States ex rel. Arant* v. *Lane*, 249 U.S. 367, 372:

> Such a long delay must necessarily result in changes in the branch of the service to which he was attached and in such an accumulation of unearned salary that, when unexplained, the manifest inequity which would result from reinstating him renders the application of the doctrine of laches to his case peculiarly appropriate in the interests of justice and sound public policy.

2. Contrary to what petitioner implies (Pet. 9), the rule which the court below applied is neither "new" nor "strange." See *United States ex rel. Arant* v. *Lane*, 249 U.S. 367; *Norris* v. *United States*, 257 U.S. 77; *Drown* v. *Higley*, 244 F. 2d 774 (C.A. D.C.); *Grasse* v. *Snyder*, 192 F. 2d 35 (C.A. D.C.); *Caswell* v. *Morgenthau*, 98 F. 2d 296 (C.A. D.C.), certiorari denied, 305 U.S. 596. The "impact" of the case extends only to those employees who manifest a lack of diligence similar to that which attended this case; to the diligent, the case imposes neither a burden nor a barrier. Moreover, it is inaccurate, on the record in this case, to imply, as petitioner does (Pet. 9), that he has been held responsible for delays beyond his control.[1] Clearly, the time for commencing

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[1] In his petition for rehearing filed with the court of appeals (included in the record filed with this Court, R. 221-230), and in his petition in this Court (Pet. 5-8) petitioner, with "record" citations to his petition for rehearing, makes several factual assertions with respect to the history of his cases in the district court. The intended import of these assertions is, apparently, to shift to the respondents the re-

the action was within his control, as was the matter of timely effecting a substitution of parties. It was, of course, the cumulative effect of the delays incident to this inaction which the court of appeals correctly "viewed as prejudicial to the Government" (Pet. App. 18).

3. The detrimental effects to the government service of petitioner's delay are manifest. He is demanding a high level supervisory position (R. 177) which has been occupied by another employee for six years since the final decision in his administrative appeal. Even if petitioner's claims were justified, the removal of the other employee at this late date from a position in which he justifiably has come to feel secure would result in the kind of disruption in the government service which the doctrine of laches is intended to foreclose.

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sponsibility for the delays which attended the prosecution of his suits. We need not and do not question the accuracy of the factual assertions, *dehors* the record in the courts below, since the assertions do not excuse petitioner's lack of diligence which largely accounts for the delays upon which the decision of the court of appeals rests.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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April 1961.

☆ U. S. GOVERNMENT PRINTING OFFICE, 1961 589760 1122